FOR ARGUMENT

(18)

No. 87-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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REPLY BRIEF FOR PETITIONERS[1]

Since 1941, Arizona's mineral leasing statute challenged here has provided for a five percent royalty on the net value of minerals extracted from school lands owned by the state. That statute was enacted pursuant to the authority expressly conferred on the state legislature by the Jones Act of 1927 in which Congress, in granting mineral lands to western states, provided that the minerals therein should be "subject to lease by the State as the State legislature may direct," and by the 1936 amendment to the Enabling Act of 1910 in which Congress similarly authorized the Arizona legislature to lease minerals in school lands that passed under that act.

The court below held that the state's authority pursuant to these federal acts extends only to the mechanics of mineral leasing. It held that the dispositional restric-

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[1] The listings required by Rule 28.1 of the Rules of this Court are at page ii of the Petition for Certiorari and page ii of the Opening Brief for Petitioners.

tions set forth in the original Enabling Act govern mineral leasing and that, accordingly, the Arizona statute is invalid because it does not provide for leasing on the basis of prior appraisal as required by the 1910 act.

In this reply brief we demonstrate the errors in the arguments supporting the decision below made by respondents and the Solicitor General as *amicus curiae* on their side. We also show that the decision below cannot be sustained on "basic trust principles" as respondents, with the apparent support of eleven western states as *amici curiae*, contend. Then we address the suggestions that the Court should not decide this case on the merits. Contrary to those suggestions, respondents have interests that satisfy the standing requirement of Article III; the decision below is final within the meaning of the Court's jurisdictional statute, and the federal question is substantial despite speculation that the Arizona Supreme Court might at some time in the future hold that appraisal prior to leasing is required by the Arizona Constitution.

ARGUMENT

I. THE JONES ACT AND THE ENABLING ACT CONFER THE MINERAL LEASING AUTHORITY EXERCISED BY THE ARIZONA LEGISLATURE.

A. The Jones Act.

By the Jones Act of 1927 Congress granted to the western states the mineral-bearing lands that had been withheld by their respective enabling or admission acts. Since the Arizona statute challenged here governs mineral leases in public lands, this case concerns, first of all, the meaning of the Jones Act. That act prohibited the sale of newly granted mineral-bearing sections but made the mineral deposits "subject to lease by the State as the State legislature may direct." 44 Stat. 1026 (Pet. Br. 1a).

Congress said in Section 1(a) of the Jones Act that the grant of the mineral-bearing sections "shall be of the same effect as prior grants for the numbered nonmineral

sections, and titles . . . shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections." Respondents and the Solicitor General, who try to play down the significance of the Jones Act, stake their all on the phrase "of the same effect" when they finally do confront the act. (*See* Resp. Br. 30-31; Sol. Gen. Br. 27.) They (and the court below) say that by use of those words Congress made leasing of mineral deposits in the newly granted mineral lands subject to all the various dispositional restrictions of the enabling and admission acts, including, in the case of Arizona, Section 28 of the New Mexico-Arizona Enabling Act, most restrictive of all. For two overriding reasons, those words will not bear such a heavy load.

First, it is the "*grant* of numbered mineral sections" that is declared by Section 1(a) to be "of the same effect as prior grants for the numbered nonmineral sections," not the restrictions on the states' disposition of the lands granted. (Emphasis added.) Restrictions on disposition are stated in the following Section 1(b). One of these clearly is not "of the same effect" as any of the restrictions in the relevant admission and enabling acts. The requirement that if the states sell any of the mineral-bearing sections newly granted they must reserve the mineral rights has no counterpart in any of the enabling acts of the western states affected by the Jones Act.[2] Other exploitable products of the land, such as timber, could be sold under the original grants.[3] In contrast, in the one all-important respect in which Congress wanted to be sure that the restrictions in the Jones Act were "of

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[2] Congress had earlier granted to Oklahoma, uniquely among the western states, mineral lands upon statehood and prohibited it for the first five years of statehood from selling such lands but allowed leasing. Oklahoma Enabling Act, ch. 3335, § 8, 34 Stat. 267, 273-74 (1906). Oklahoma was not affected by the Jones Act. (*See* Pet. Br. 26 n.24.)

[3] *See* New Mexico-Arizona Enabling Act, § 28, allowing sale "of any timber or other natural product" of the granted lands. (Pet. Br. 5a.)

the same effect" as those in the enabling acts, it specified in Section 1(b) that the proceeds from leases of mineral rights were "to be utilized for the support or in aid of the common or public schools." On the view of respondents and the Solicitor General, Congress, having said one thing in subsection (a) of Section 1 of the Jones Act ("of the same effect"), proceeded both to contradict itself (no sales of mineral rights) and to repeat itself (proceeds to be used for the public schools) in subsection (b). That is not credible.

Second, the way respondents and the Solicitor General read the Jones Act leaves no meaning—none—for the authorizing phrase "as the State legislature may direct." Respondents do not even try to grapple with the presence of this phrase in the Jones Act. The Solicitor General refers only to what the court below said—that the phrase merely meant to give the state legislature "power to regulate the overall manner of the making of the lease, and the general terms of the lease, so long as there is substantial conformity to the restrictions of § 28." (Sol. Gen. Br. 27, 23.) But that cannot rationally be. Taking Arizona as an example, it had the power under Section 28 of the 1910 Enabling Act to sell and lease the nonmineral lands that were granted by that act, subject to the requirements of advertising, auction, and prior appraisal. Congress had not thought it necessary to include in Section 28 as it was enacted in 1910 the obvious point that it would be the state lawmaking body that would determine the overall manner of making the permitted leases and sales. Yet surely the Arizona legislature had that power. And it would just as surely have had the power to prescribe the mechanics of leasing mineral deposits if in the Jones Act Congress had not said "as the State legislature may direct." As is more fully developed in our discussion of a similar phrase in the amended Section 28 of the Enabling Act, p. 8 below, Congress has used just such an expression of authority to make clear that states are free from some or all federal dispositional restrictions.

Given the all-but-unmistakable meaning the words of the Jones Act convey, it scarcely matters whether Secretary of the Interior Work's authoritative draftsman's explanation of subsection (a) excludes the expansive reading of the "same effect" clause that is essential to the holding of the court below (*see* Resp. Br. 31 n.29; Sol. Gen. Br. 27 n. 20), though his explanation does exclude that reading and committee and floor sponsor comments on his bill nail down the exclusion.[4]

Nor does respondents' law Latin (Br. 32) advance analysis. Of course, the Jones Act is related to the New Mexico-Arizona Enabling Act and the enabling acts of the other western states—*in pari materia* if you will. But surely, if that related piece of legislation expresses a policy that diverges from that of the enabling acts, the expressed policy must be given effect. The new policy of deference to state legislative judgment in mineral leasing appears on the face of the Jones Act as well as in the remarks of sponsors such as Congressman Sinnott (Pet. Br. 30).

B. The Amended Enabling Act.

The original New Mexico-Arizona Enabling Act of 1910 did not deal purposefully with the leasing of mineral deposits because known mineral lands were withheld from numbered sections granted to the states.[5] Accord-

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[4] *See* Pet. Br. 33. The Secretary may very well have used the "same effect" phrase out of concern that there were incidents of grants of federal public lands other than the time at which and manner in which title would vest that should be provided for in carefully drawn legislation. Neither in his letter explaining his revised bill nor elsewhere in the House committee report where the letter is published is there a suggestion that states were to be bound by all the restrictions of their enabling or admission acts in leasing the deposits in the newly granted mineral lands. H.R. Rep. No. 1761, 69th Cong., 2d Sess. (1927). The House, debating the bill, was told by Congressman Winter, a proponent, that Secretary Work's revised bill was "in substance the same" as the original House substitute, 68 Cong. Rec. 2581 (1927), which did not contain the "same effect" language or anything like it.

[5] This Court had decided in 1898 in Shaw v. Kellogg, 170 U.S. 312, 331 (Resp. Br. 27 n.24), that a subsequent discovery of min-

ingly, Arizona and New Mexico authorized mineral deposits to be leased without the nearly impossible prior appraisal and without the advertising and auction that would discourage the prospecting that would bring about discovery of minerals in the first place. (Pet. Br. 24-25.) The New Mexico Supreme Court agreed with its legislature that the dispositional restrictions in the New Mexico-Arizona Enabling Act had no application to mineral leases and upheld the legislature's mineral leasing statute on that ground. *See Neel* v. *Barker*, 204 P. 205 (N.M. 1922). Congress in 1928 confirmed the New Mexico view by authorizing New Mexico to amend its constitution, which was bound to conform to the Enabling Act,[6] to permit it to lease minerals on such terms "as may be provided by" the New Mexico legislature. (Pet. Br. 25.)

Arizona's turn came in 1936 when Congress amended Section 28 of the Enabling Act to provide that Arizona could lease mineral lands for terms of up to twenty years "in a manner as the State legislature may direct." By this action, Congress gave Arizona the same mineral leasing authority it had accorded New Mexico in 1928. The Senate and House committee reports, which are nearly identical, make it eminently clear that Congress intended that Arizona have broad authority to lease later-discovered mineral lands that had passed to the state under the Enabling Act and were not governed by the Jones Act.[7]

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erals would not operate to revoke title that had passed to private persons under a federal grant intended "finally [and] speedily" to resolve certain claims under earlier grants by Mexico. There is no basis for even suggesting that Congress had this obscure and very particular precedent in mind when it specifically withheld mineral land from Arizona and New Mexico and therefore meant to deal with later-discovered minerals.

[6] *See* §§ 2, 10, 36 Stat. 560, 563.

[7] S. Rep. No. 1939, 74th Cong., 2d Sess. 1-3 (1936); H.R. Rep. No. 2615, 74th Cong., 2d Sess. 1-3 (1936). It is no derogation of this legislative history that the supporting statements are in Cabinet officers' letters to the committees (Resp. Br. 37 n.34). Both committees stated that the "facts concerning the proposed legislation" were in those letters, which the committees expressly "made a part" of their reports.

The reasons offered by the proponents of the decision below for not giving the apparent intended scope to the phrase "in a manner as the State legislature may direct" in the 1936 amendment to the Enabling Act are as empty as those offered for denying effect to the comparable provision of the Jones Act.

There is first the extravagant contention of respondents that the natural reading of the phrase "would literally eviscerate the school land trusts throughout the West." (Br. 23.) Beneath the hyperbole, that seems to be a contention that Congress has used the same or similar phrase in enabling and admission acts to permit states to provide for the ministerial details of mineral leasing but has not used such language to authorize states to make mineral leasing policy. (*Id.* at 23-24 & n.20.) That is not the case. In the first place, the only previous western enabling act that granted mineral lands was Oklahoma's, and in that one, as we have pointed out (Pet. Br. 21), Congress was careful to empower the state legislature only to prescribe "additional" legislation governing mineral leases "not in conflict" with specific federal restrictions that included advertising and sealed bids but not appraisal.[8] The later grant of mineral lands to Alaska (*see* Resp. Br. 24 n.20) is in nearly the precise terms of the Jones Act, so that the only federal restriction on leases is the requirement that proceeds be used for the public purposes specified in the act.[9] Unless the provision of that statute that mineral deposits are "subject to lease by the State as the State legislature may direct" empowers Alaska to determine

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[8] 34 Stat. 273-74.

[9] Alaska Statehood Act, § 6(i), 72 Stat. 339, 342 (1958). The Hawaii Statehood Act, also cited by respondents, does not deal specifically with mineral lands but grants the new state the utmost leeway in managing and disposing of granted lands so long as the proceeds are used for the purposes specified in the act. § 5(f), 73 Stat. 4, 6 (1959).

leasing policy, there is a void because there is no stated federal policy.

As for the statutes in which the phrase is used in respect of matters other than mineral leases, they prove our point, not respondents': the phrase is used concerning transfers of interests in land that clearly are free of restrictions imposed on other such transfers. Thus, the Idaho Admission Act (Resp. Br. 24 n.20) provides that granted lands "shall be disposed of only at public sale" but "may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years." [10]

Then there is the Solicitor General's argument (Br. 22-24), which tries to explain (as respondents do not) the fact that the 1936 amendment begins by saying that "nothing herein contained" shall prevent Arizona from leasing its school lands for mineral purposes for twenty years or less "in a manner as the State legislature may direct." The Solicitor General merely quotes the court below in urging that the latter words encompass only the power "to regulate the overall manner of the making of the lease" and the "general terms of the lease" while requiring "substantial conformity" to all the restrictions of Section 28. The explanation that the Solicitor General

[10] Ch. 656, § 5, 26 Stat. 215, 216 (1890). The quotation in the text is from the original act, cited by respondents; subsequent amendments lengthened the permissible lease term to ten years for all leases and then to the period of production for oil and gas leases, 56 Stat. 48 (1942); 63 Stat. 714 (1949). *See also* Wyoming Admission Act, as amended, ch. 664, § 5, 26 Stat. 222, 223 (1890); 48 Stat. 350 (1934); 63 Stat. 703 (1949), North Dakota, South Dakota, Montana and Washington Admission Act, as enacted and cited by respondents, ch. 180, § 11, 25 Stat. 676, 679 (1889). *Cf. id.*, as amended, 47 Stat. 150 (1932); 52 Stat. 1198 (1938); 62 Stat. 170 (1948); 81 Stat. 106 (1967) ("Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe."). The Oklahoma Enabling Act, ch. 3335, § 8, 34 Stat. 267, 273 (1906), uses the phrase "as the legislature may prescribe" to authorize the state to apportion and dispose of a numbered school section previously reserved for a certain purpose and now free of the reservation.

adopts denies effect both to "nothing herein contained" and to "as the State legislature may direct."

Ever since 1910, under the specific terms of the second sentence of the third paragraph of Section 28, Arizona had the power to lease the nonmineral school lands granted by that act for any period of time so long as there was substantial conformity with the requirements contained in Section 28. (Pet. Br. 9a-10a.)[11] Thus the Arizona legislature must have had the inherent power to regulate the "overall manner of the making" of the authorized sales and leases and their "general terms" without Congress having to say so. Unless the legislature had that power, nobody did and there could be no leases, or sales for that matter.

The 1936 amendment had to mean some different treatment of twenty-year mineral leases or Congress would not have bothered. But the court below and the Solicitor General say, to the contrary, that *everything* "herein contained," every restriction set forth in Section 28, still applies to such leases, and the legislature has no more power over them than it necessarily had over unlimited-term leases under the 1910 act.

The Solicitor General is willing to retreat one step if forced to it. Maybe, he says, the phrase "nothing herein contained" can be read to eliminate the advertisement requirement of the third paragraph of Section 28. This is because the 1936 amendment took the form of an enlargement of an original proviso in the 1910 version of the third paragraph of Section 28 allowing five-year leases without advertisement. But in 1936 Congress did not just repeat for twenty-year mineral leases what it had said about five-year leases in 1910. It kept "nothing

[11] Sales and leases of school lands are authorized in identical terms by the second sentence of the third paragraph, and the fourth paragraph speaks of "leaseholds" being offered. There is for this reason nothing to respondents' murky suggestion (Br. 20-21), that "nothing herein contained" was necessary to free short-term leases from the ban on encumbrances stated in the first sentence of the third paragraph of Section 28.

herein contained" (which in the context of the Enabling Act reached as far as it could (Pet. Br. 21)) and in addition, just as expansively, said substantially what it had said nine years before in the Jones Act when it made state legislatures responsible for leases of known mineral deposits: "in a manner as the State legislature may direct." The intention to free twenty-year mineral leases from all the restrictions of Section 28 is plain.

In the end, the proponents of the decision below lay their heaviest emphasis on the 1951 amendment to the Enabling Act. That emphasis is misplaced. To begin with, all that Congress did in 1951 with respect to nonhydrocarbon mineral leases (covered by the Arizona statute challenged here) was to make clear that they could be combined with grazing and agricultural leases and to change slightly the wording of the conferral of authority on the legislature. The 1951 amendment continued the policy that animated the Jones Act and the 1936 amendment: "nothing herein contained" was to prevent "the leasing of any of the said lands, in such manner as the Legislature of the State of Arizona may prescribe" for mineral purposes. The proponents, however, seize on language Congress used to describe the state legislature's power over the leasing of hydrocarbon minerals, which Congress in 1951 made subject to a somewhat different leasing regime that is not an issue in this case.

The language they rely upon provides that the state legislature may determine the manner of leasing hydrocarbon minerals "with or without advertisement, bidding, or appraisement." That language makes clear that the new provisions for hydrocarbon leasing, which extended the permissible duration of leases from twenty years to as long as production continues and which set a minimum royalty of twelve and one half percent, would not affect the freedom already enjoyed by the state legislature to use or not to use appraisal or public sale procedures. No significant change was made in the legislature's leasing authority with respect to nonhydrocarbon leases and, accordingly, no such clarifying language was necessary.

The legislative history of the 1951 amendment confirms that Congress intended to continue to relieve Arizona of federal restrictions on the manner of leasing state-owned mineral lands. The Senate committee was convinced that the legislature of Arizona "is able and is to be trusted to safeguard the interest of all of its citizens in the leasing of its State lands, as the legislatures of sister States have been trusted to the benefit of the citizens of the State and the Nation." S. Rep. No. 194, 82d Cong., 1st Sess. 2 (1951). The committee report states that the amendment was intended to place Arizona on an "equal footing with the greater number of her sister States," noting, among others, New Mexico, where "there are no Federal restrictions on the terms and manner of issuing . . . mineral leases, including those for oil and gas." *Id.* at 2, 3.[12]

Under the Enabling Act of 1910, Arizona had full authority over the ministerial details of all manner of leases of school lands. It enjoyed that authority by reason of its sovereignty and not by reason of any delegation of authority by Congress; there was none. To contend that the specific delegations of authority to lease minerals that Congress made to Arizona in 1927 and 1936 and reaffirmed in 1951 merely had the effect of giving the state dominion over ministerial details, which the state already enjoyed, is to assert that these delegations lacked all substance. There was substance. Pursuant to these acts, for almost fifty years Arizona has leased mineral lands as its legislature prescribed and without prior appraisal, and at no time has the Attorney General of the United States challenged that practice even though he is expressly given the duty of enforcing the provisions of both the Enabling Act and the Jones Act. *See* 36 Stat. 575; 44 Stat. 1027.

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[12] Respondents' claim (Br. 20) that an advertisement requirement governs mineral leasing under the enabling acts of those sister states is flatly wrong, *see, e.g.*, Wyoming Admission Act, as amended, ch. 664, § 5, 26 Stat. 222, 223 (1890); 48 Stat. 350 (1934); 63 Stat. 703 (1949); Idaho Admission Act, as amended, ch. 656, § 5, 26 Stat. 215, 216 (1890); 56 Stat. 48 (1942); 63 Stat. 714 (1949).

II. THE DECISION BELOW CANNOT BE SUSTAINED BY RESORT TO BASIC TRUST PRINCIPLES.

The second paragraph of Section 28 of the Enabling Act says that "[d]isposition of" any of the granted lands "in any manner contrary to the provisions of this Act . . . shall be deemed a breach of trust." (Pet. Br. 4a-5a.) To that extent, there is an issue of breach of trust in the case. It is congruent with and adds nothing to the issue of statutory construction.

Respondents, however, make a separate breach of trust argument that is not in the case. They seek to support the decision of the court below on the basis of "basic principles of trust law," not otherwise specified. (Resp. Br. 40.) A brief *amici curiae* filed on behalf of eleven western states may be directed to this same contention.

Trust principles may govern the administration by Arizona of all school lands, mineral and nonmineral, granted to it by the federal government. While the Jones Act does not on its face convey lands in trust, its requirement that rental proceeds be used for the public schools might be read as imposing trust obligations. *See Papasan* v. *Allain*, 478 U.S. 265, 289 n.18 (1986). In any event, petitioners do not claim that the Jones Act repealed the state's trust responsibilities (*see* States Br. 1). But the decision below does not rest upon trust principles apart from the finding that the specific terms of Section 28 of the federal Enabling Act were violated; no findings of other trust violation were made or could have been made; and the court's decision, based on cross-motions for summary judgment without findings of fact, considered only the question of statutory interpretation.

Indeed, in reaching its decision, the court below observed that Arizona's royalty statute would still be invalid "even if the overall effect of [the Arizona leasing statute] encouraged greater production so that lessees pay higher royalties to the state than would be paid on a fair value basis." (Pet. 25a.) Thus, the court below did not hold, and could not have held on the record before it,

that, apart from its inconsistency with the fourth paragraph of Section 28 of the Enabling Act, the Arizona statute was, as respondents urge, a breach of trust (Resp. Br. 41).

All stops are pulled in the chorus of invective directed by respondents and eleven states at Arizona's mineral leasing statute with its royalty rate of a flat five percent of net value. It would be easy to forget in the reading of the invective that there is no inherent inconsistency between a flat percentage royalty rate applied to a market-based value and maximization of revenues. It is a characteristic of percentages that what they produce varies with the value of what they are applied to. Five percent of the value of a pound of gold is a lot more than five percent of the value of a pound of lead. There is no such "ceiling" as respondents and the states suggest on what Arizona will receive from highly productive mining of a valuable mineral.

This Court need not decide, or even be concerned with, whether Idaho's minimum royalty on leases of two and one half percent (States Br. 15) or Colorado's range of royalties from four to seven percent (*Id.* at 12) would produce more revenues for Arizona than a five percent royalty. That is a matter for decision by the Arizona legislature, acting on behalf of its citizenry, as Congress provided.

III. THIS CASE IS PROPERLY BEFORE THE COURT.

A. Standing.

Contrary to the contention of the Solicitor General (Br. 14-18), respondents, who prevailed as plaintiffs below, have a sufficient interest in the subject matter of this action to create a case or controversy within the meaning of Article III.

One of those respondents is the Arizona Education Association, which asserts the interests of its members, who are 20,000 Arizona public school teachers. The Association alleged that the failure of Arizona officials to base

mineral leases on appraised value "imposes an adverse economic impact on the Association and its members" and adversely affects the "quality of education in Arizona." (*See* Sol. Gen. Br. 17-18 & n.11.) Given the uncontroverted dependence of the Arizona public schools and their teachers on the proceeds of the school trust lands, that is an allegation of injury in fact that qualifies the teachers for standing under Article III. The teachers have an unquestioned personal economic interest in the level of their salaries, and the harm they suffer in the pursuit of their profession from crowded classrooms and lack of books and computers is at least as individual and particular to them as the harm resulting from the discarding of recyclable goods in the parks near Washington to the young plaintiffs in *United States* v. *SCRAP*, 412 U.S. 669, 686-90 (1973).[13] Teachers are uniquely affected by the myriad ingredients that determine the "quality of education" and depend largely on money, and they suffer uniquely when those ingredients are wanting.

The Solicitor General asserts, however, that the Association cannot allege with sufficient certainty that the relief it seeks—invalidation of the state's leasing statute—will necessarily result in an increase in public school teachers' salaries; he does not deign even to consider whether the "quality of education" may improve. Under federal standing law, however, a fair or reasonable likelihood of redress is enough; certainty is not required. In *Bryant* v. *Yellen*, 447 U.S. 352, 366-68 (1980), litigants were held to have standing though they "could not with certainty establish" that they would realize the benefits they sought if they obtained the legal relief they were seeking, *id.* at 367. An infusion of public school revenues is highly likely to result in higher teacher salaries, improved classroom conditions or both. The teach-

[13] *See also* Pennell v. City of San Jose, 108 S. Ct. 849, 855 (1988); Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 n.4 (1986); Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

ers were not bound to anticipate and refute, as the Solicitor General suggests, other possibilities such as that the increase in leasing revenues from school lands would be offset by diversion of existing tax funds from the support of the public schools. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 77-78 (1978).

Should there be such a diversion, it would in any event be to the benefit of the other plaintiff-respondents, three named Arizona taxpayers.[14] They alleged in the complaint that the Arizona mineral leasing royalty statute has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." Their grievance thus concerns "a direct dollars-and-cents injury," *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952), and their lawsuit therefore meets the test for a case or controversy under Article III indicated in that case: that it be "a good-faith pocketbook action," *id.* In these circumstances, it is quite beside the point that, as the Solicitor General says, "this Court has consistently held that a person does not satisfy the standing requirement of Article III based on nothing more than his status as a citizen or taxpayer who is interested in the conduct of his government" (Sol. Gen. Br. 15). The respondent-taxpayers' interest is not merely that of citizens interested in good government. The Court has never disavowed the distinction drawn in *Doremus* between taxpayers motivated by a "pocketbook" concern who had standing to litigate an Article III case or controversy in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and those motivated by "a religious difference" in *Doremus* who did not.[15]

[14] Section 28 of the Enabling Act (Pet. Br. 8a) specifically recognizes the interest of Arizona citizens in enforcing the dispositional provisions of the act. 36 Stat. 575.

[15] Two of the petitioners did, as the Solicitor General points out (Sol. Gen. Br. 15-16, 17 n.10), question in the trial court whether by Arizona standards the teachers and the taxpayer-plaintiffs had

Should the Court nonetheless conclude that respondents lack standing to maintain this action, petitioners submit that the proper course would be to vacate the judgment of the Arizona Supreme Court. *Cf. DeFunis* v. *Odegaard*, 416 U.S. 313, 320 (1974). It should not leave in effect a state court's decision of a federal question that cannot be reviewed here because of a defect in the prevailing party's standing, as the Solicitor General urges, though that is the suggestion of *Doremus*, 342 U.S. at 434; *see also City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 243 (1983).

A significant element of the suggestion in *Doremus* was the Court's indication that it would not treat the decision of the underlying federal issue as binding on it if the nonprevailing party could somehow secure a decision in a second case that satisfied Article III. 342 U.S. at 434. But in this case there is little chance that petitioners could secure a second decision that this Court would want to exercise its discretion to review. If the Court were to dismiss the present petition, the Arizona legislature would be confronted by a decision of its highest court, binding on it, that one of its statutes is invalid. The legislature will very likely believe that the responsible course is to write substitute legislation that is valid under that decision, eliminating any opportunity for review of an important question of federal law.

B. Finality.

The Solicitor General argues that the judgment of the Arizona Supreme Court is not sufficiently final to give this Court jurisdiction under 28 U.S.C. § 1257(3). Specifically, he says that it remains to be determined whether petitioners' present mineral leases are void because "not

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the requisite interest to maintain this suit. But, as the superior court implicitly held in rejecting that argument, Arizona law does not require a plaintiff to be able to prove conclusively that the injury he claims to be suffering would be redressed by the relief he seeks. No more, as we have shown, does the federal law of Article III standing.

made in substantial conformity" with the Enabling Act. (Br. 11.) But the validity of those leases is not within the issues that have to be (or can be) determined in this lawsuit. What does remain to be done on remand is fully consistent with this Court's description of the "additional proceedings anticipated in the lower state courts" that do not deprive a state appellate court's final decision on a federal issue of the finality requisite to review here. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975).

In their complaint respondents, in addition to costs and attorneys' fees and the usual "other and further relief," asked for (1) a declaratory judgment that the Arizona mineral lease royalty statute violated the Enabling Act and the Arizona Constitution, (2) an injunction against *further* leases in violation of the Enabling Act and the Arizona Constitution, and (3) an accounting of sums due (under the existing leases) and an order directing that such sums be paid. (*See* J.A. 1, item 1.)

Respondents moved for partial summary judgment on their first prayer only.[16] The limited scope of respondents' lawsuit was confirmed in their brief on appeal. They said that they had dropped their request for an accounting, and the prayer of the brief was for reversal of the trial court's judgment and entry of an order (1) declaring the royalty statute void for violation of the Enabling Act and the Arizona Constitution and (2) remanding the case "for further appropriate proceedings, including entry of a permanent injunction prohibiting the defendants [state officials] from entering into fur-

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[16] Although, in denying their motion and granting petitioners' motions for summary judgment dismissing the complaint, the trial court said that "[p]laintiffs claim that the various mineral leases held by the Intervenors of State trust lands are void" (Pet. 38a), nothing in the record suggests that any such claim was before the trial court on the cross motions or on the pleadings generally, and it surely was not decided.

ther lease agreements in violation of the Enabling Act and the Arizona Constitution." (*See* J.A. 10, item 11/29/85, at 6 n.3, 40.)

The Arizona Supreme Court's order of reversal and remand (Pet. 29a) is consistent with respondents' prayer despite the effort of the Solicitor General (Br. 11), built on out-of-context bits from here and there in the court's opinion, to make it appear that the court directed the trial court to consider on the remand whether to grant relief respondents had not requested by declaring existing mineral leases void. The court gave no such direction.

It will be appropriate, on the pleadings, for the trial court on the remand to consider entering an order in the nature of mandamus or prohibition (for which the Arizona "special action relief" referred to in the remand order is a substitute (*see* Pet. 3a n.2)) directing the defendant state officials not to make further leases under the invalidated statutes; such an order, indeed, seems inevitably to follow from the supreme court's decision. It will not be appropriate, on the pleadings, to adjudicate whether existing leases are void. The prohibition of future leases is either ministerial or preordained and thus falls within the *Cox Broadcasting* categories of cases in which state court judgments are final even though something remains to be done. Any additional proceedings in this case "would not require the decision of other federal questions that might also require review" by this Court. 420 U.S. at 477; *Duquesne Light Co.* v. *Barasch*, 109 S. Ct. 606, 615 (1989).

C. The Arizona Constitution.

The State of Arizona through its Attorney General, in a belated appearance as *amicus curiae*, speculates that, given an opportunity, its supreme court might hold some time in the future that Article X of the Arizona Constitution renders the challenged leasing statute invalid whether or not the Enabling Act does. Accordingly, the

state contends that the requirements of the Enabling Act as determined by the court below are "purely academic" and prays that the case be dismissed for lack of a substantial federal question. (Ariz. Br. 5.) The Solicitor General joins in this speculation and suggests that, on that basis, the Court "may wish to decline the question presented." (Sol. Gen. Br. 24 n.18.) Despite their musings as to the possible reach of the Arizona Constitution, neither the state nor the Solicitor General suggests that the decision below rests upon an adequate and independent state ground so as to deprive this Court of jurisdiction. They could not in the light of *Michigan* v. *Long*, 463 U.S. 1032, 1037-44 (1983).

Article X of the Arizona Constitution was not overlooked by the court below. It was in this case from the time the complaint was filed. At no time was it suggested that it had any meaning other than that found in the Enabling Act of 1910, as amended, of which Article X is a rescript. In passing the Enabling Act, Congress required Arizona to adopt in its constitution the terms of that act governing the disposition of land.[17] The court below, in interpreting both the Enabling Act and Article X, treated as the central issue the "intent of Congress with respect to the wording upon which Respondents [these petitioners] rely." (Pet. 13a.) It was its analysis of the intent of Congress that led the court to its conclusion that the Arizona leasing statute violated both the Enabling Act and the Arizona Constitution.

The basis for the suggestion that Article X of the Constitution limits Arizona's mineral leasing authority in any way that the Enabling Act does not is a decision of the Arizona Supreme Court that involved neither leases nor mineral lands. *Deer Valley Unified School District*

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[17] The terms of and conditions on disposition of land in the Enabling Act of 1910 and in its obligatory rescript, Article X of the Arizona Constitution, are intended to be congruent. *See* § 20, 36 Stat. 570-71; Ariz. Const. art. X, § 1; *id.*, art. XX, ¶¶ 12-13.

No. 97 v. *Superior Court*, 760 P.2d 537 (Ariz. 1988). In that case the court held that, even though the Enabling Act did not require advertising and auction upon condemnation of state lands, Article X of the Arizona Constitution did.

The Arizona Supreme Court had the opportunity in this case to determine whether there is similarly something in the Arizona Constitution that is not in the Enabling Act that limits the state's authority to lease minerals on federally granted lands. It made no such determination. What that court might determine in this respect, should it at some time in the future be called upon to do so, is sheer speculation.

CONCLUSION

The judgment of the Supreme Court of the State of Arizona should be reversed.

Respectfully submitted,

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